U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 December 2006

Case No.: 2005-BLA-5589

In the Matter of:

E.J.,
Claimant

v.

PACE ENERGIES, INC.,
Employer

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:
Stephen A. Sanders, Esq.
Prestonsburg, Kentucky
For the Claimant

Francesca Maggard, Esq.
Hazard, Kentucky
For the Employer

Thomas A. Grooms, Esq.
Nashville, Tennessee
For the Director, OWCP

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

The Claimant, represented by counsel, appeared and testified at the formal hearing held June 6, 2006, in Prestonsburg, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Thereafter, I closed the record on September 7, 2006.[1] I based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, Employer and Claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

E.J. ("Claimant") filed his first claim for benefits on December 19, 1994. (DX 1). The District Director denied his claim on May 4, 1994. Claimant appealed the findings and the claim was transferred to the Office of Administrative Law Judges. A hearing was held on June 7, 1996. Then on September 25, 1996, Judge Leland issued a Decision and Order Denying Benefits. Claimant filed a subsequent claim for benefits on July 31, 1998. However, on November 30, 1998 the District Director denied his claim. The claim was administratively closed due to abandonment on February 10, 1999. (DX 1).

Claimant then filed the instant subsequent claim for benefits on July 24, 2002. (DX 3). On September 20, 2003 the District Director awarded benefits and found Little Mining Inc. the responsible operator. (DX 32). However, the District Director later issued a Revised Decision and Order dismissing Little Mining Inc. as a party and designating Pace Energies as the potential responsible operator. (DX 45). Therefore, the District Director had to reopen the record. After accepting additional evidence from Pace Energies, a new Decision and Order was issued on August 9, 2004, which denied benefits to Claimant. (DX 83). Then another Revised Decision and Order Denying Benefits was issued on November 9, 2004. Claimant requested a hearing on November 12, 2004. (DX 89). The claim was transferred to the Office of Administrative Judges on February 14, 2005. (DX 92).

Factual Background

Claimant was born on March 20, 1948, and has ninth grade education. (DX 3; Tr. 24). He is married to R.B.; however, the couple is separated. (DX 3, 33). Claimant worked as a drill

[1] At the hearing the parties were allowed until September 7, 2006 to file post-hearing briefs. The Employer filed its brief late. The Director and Claimant served their briefs on the deadline date, while the Employer filed a request to submit its untimely brief more than two months after the brief was due. Because the request for an extension of time was itself filed months after the due date and Employer has not advanced other sufficient reason to extend the deadline, its motion is denied and Employer's brief will not be taken into consideration.

operator, shooting coal and as a roof bolter. (Tr. 25). He worked in underground coal mine employment between 1974 and 1991. (DX 3). He was exposed to coal dust on a daily basis. (Tr. 34). He did wear a mask at times, but testified that it did not help and he would still breath in the dust. (Tr. 37). Claimant left coal mine employment due to a back injury. (Tr. 38). Dr. Alam treats Claimant for his lung condition. (Tr. 39). He prescribes oxygen and Albuterol. (Tr. 39). Claimant stated that Dr. Alam told him that he was totally disabled due to pneumoconiosis but he did not state the date of the conversation. (Tr. 47). Claimant testified that his breathing condition interferes with his ability to climb stairs, walk long distances, exert himself and to sleep. (Tr. 41-42). Claimant has a history of heart disease, open heart surgery and kidney problems. (Tr. 43, 49).

Claimant testified that he used to smoke between half-a-pack and one pack of cigarettes per day between 1965 and 2000. The evidence of record supports Claimant's testimony. Therefore, based on all the evidence of record, I find that that Claimant smoked between half-a-pack and one pack of cigarettes per day for thirty-five years.

Contested Issues

The parties contest the following issues regarding this claim:

1. Whether Claimant's claim was timely filed;

2. Whether the Employer is the properly designated Responsible Operator;

3. Whether Claimant's most recent period of cumulative employment of not less then one year was with the Employer;

4. The length of Claimant's coal mine employment;

5. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

6. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

7. Whether Claimant is totally disabled;

8. Whether Claimant's total disability, if present, is due to pneumoconiosis; and,

9. Whether the evidence establishes a material change in conditions per 20 C.F.R. 725.309(c),(d).

Employer also contests other issues that are identified at line 18(b) on the list of issues. (DX 45). These issues are beyond the authority of an administrative law judge and are preserved for appeal.[2]

[2] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act; therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

Dependency

Claimant alleges one dependent for the purposes of benefit augmentation, namely his wife, R.B. (DX 3). Claimant and his wife married on September 3, 1977. (DX 3). At the hearing Employer stipulated to dependency. (Tr. 22). Therefore, I find that Claimant has one dependent for the purposes of benefit augmentation.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. The District Director made a finding of ten years in coal mine employment. (DX 83). Employer stipulated to ten years at the hearing. However, Claimant argues that he worked seventeen years in coal mine employment. The documentary evidence includes Claimant's Social Security earnings report, an employment questionnaire and statements from his employers. (DX 4-7). Accordingly, after considering all the evidence of record, I find that Claimant worked in coal mine employment for ten years. He last worked in the Nation's coal mines in 1991. (DX 7).

Timeliness

Under Section 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The Employer must rebut this presumption. The record contains no evidence establishing that a physician has ever informed Claimant that he was totally disabled due to pneumoconiosis three years prior to the filing of his claim. At the hearing Employer questioned Claimant regarding his past medical history. Although Claimant testified that Dr. Alam informed him that he is totally disabled due to black lung disease, Employer never asked when this conversation took place. Therefore, there is no information in the record to indicate that Claimant was informed that he is totally disabled due to pneumoconiosis with a well-reasoned and documented opinion three years prior to filing his claim. Therefore, Employer has failed to meet its burden, and I find that this claim was timely filed.

Responsible Operator & Most Recent Period of Cumulative Employment of Not Less Then One Year

Liability is assessed against the most recent operator which meets the requirements at 20 C.F.R. §§ 725.492 and 725.493 (2000) and 20 C.F.R. §§ 725.491-725.494 (2001). 20 C.F.R. § 725.418(c) (2001) requires that the District Director name a responsible operator which is potentially liable for the payment of benefits. Pace Energies, Inc. ("Employer") has been named the responsible operator in this claim. Section 495 addresses the responsible operator as:

> (a) (1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the "responsible operator") shall be the potentially liable operator, as determined in accordance with Sec. 725.494, that most recently employed the miner.
>
> (2) If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any

benefits payable as a result of such employment shall be assigned as follows:

(i) First, to the potentially liable operator that directed, controlled, or supervised the miner;

(ii) Second, to any potentially liable operator that may be considered a successor operator with respect to miners employed by the operator identified in paragraph (a)(2)(i) of this section; and

(iii) Third, to any other potentially liable operator which may be deemed to have been the miner's most recent employer pursuant to Sec. 725.493.

(3) If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with Sec. 725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator.

(4) If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph (a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of Sec. 725.494, the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

(b) Except as provided in this section and Sec. 725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to Sec. 725.410 (the "designated responsible operator") is a potentially liable operator. It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with Sec. 725.494(e).

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with Sec. 725.606; or

(2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of Sec. 725.494. **In order to establish that a**

more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with Sec. 725.606.

The Courts have also held that the time a miner is carried on a payroll due to "injury time" may be counted in determining length of coal mine employment. The Board held that, as a matter of fairness, this time should be counted because the miner could not work due to an employment-related injury. *Soulsby v. Consolidation Coal Co.*, 3 B.L.R. 1-565 (1981), *rev'd on other grounds*, 679 F.2d 888 (4th Cir. 1982)(per curiam); *See also Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984). Furthermore, in *Thomas v. Beth Energy Mines, Inc.*, 21 B.L.R. 1-10 (1997) (on recon.), the Board held that the time during which the miner was on sick leave for a back injury counted towards his length of coal mine employment with the responsible operator.

Employer argues that since Claimant did not physically work for Employer a full calendar year, it is not the properly designated responsible operator. Claimant was employed by Employer between November 29, 1990 and October 23, 1991. Claimant left his employment with Employer due to a work-related back injury he sustained on October 23, 1991. After his injury he received seventy-five weeks of workers' compensation benefits from Employer for the injury as part of a settlement. Although Claimant was not on actual approved leave from Employer, the situations discussed above are analogous to Claimant's situation. Claimant was unable to physically work due to his work-related injury and as a result, Employer paid him workers' compensation benefits. Therefore based on the cases above I find that Claimant's 75 weeks of workers' compensation benefits should be counted in determining whether Claimant worked one full calendar year for Employer. Accordingly, after examining all the evidence of record, I find that Employer has not presented sufficient evidence to rebut the presumption that it is the properly designated responsible operator in this case.

Threshold Issue for Subsequent Claims

Under the amended regulations of the Act, the progressive and irreversible nature of pneumoconiosis is acknowledged. 20 C.F.R. § 718.201(c). Consequently, claimants are permitted to offer recent evidence of pneumoconiosis after receiving a denial of benefits. *Id.* The new regulations provide that where a claimant files a subsequent claim more than one year after a prior claim has been finally denied, the subsequent claim must be denied on the grounds of the prior denial unless "Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, only then must the administrative law judge consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.* A duplicate claim will be denied unless Claimant shows that one of the applicable conditions has changed since the date of the previous denial order. *Id; see, also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6th Cir. 1994).

Accordingly, because Claimant's previous claim was denied, he now bears the burden of proof to show that one of the applicable conditions of entitlement has changed. 20 C.F.R.

§ 725.309(d). I must review the evidence developed and submitted subsequent to November 30, 1998, the date of the prior denial, to determine if he meets this burden. *Id.*

The following elements were deemed not shown by Claimant as a result of the initial denial: That he had pneumoconiosis as defined by the Act and the regulations; his pneumoconiosis arose out of coal mine employment; and he is totally disabled due to pneumoconiosis. 20 C.F.R. § 410.410(b).

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414(a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii). **Since this is a subsequent claim only evidence submitted after November 30, 1998 will be considered unless a material change in physical condition is proven. 20 C.F.R. § 725.309(d). Furthermore, only the evidence properly designated on the parties' evidence summary forms will be taken into consideration.**

A. X-ray Reports[3]

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation
DX 10	9/17/02	Baker B-reader	1/0
DX 80	9/17/02	Wheeler B-reader/BCR	No abnormalities consistent with pneumoconiosis
DX 87	9/17/02	Miller B-reader/BCR	1/1

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation
DX 70	3/25/04	Fino B-reader	No abnormalities consistent with pneumoconiosis
DX 87	3/25/04	Miller B-reader/BCR	1/0
EX 2	3/25/04	Fino B-reader	Rehabilitative opinion. Continues to find no evidence of pneumoconiosis
DX 69	4/03/04	Dahhan B-reader	No abnormalities consistent with pneumoconiosis
DX 87	4/03/04	Miller B-reader/BCR	1/0

B. Pulmonary Function Studies[4]

Exhibit/ Date of exam	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 10 9/17/02	Baker	54/ 66 ¾"	2.15	3.05	N/A	70	Yes	Fair cooperation and effort
DX 70 3/25/04	Fino	56/ 65 ½"	1.59	2.29	N/A	69	Yes	Questionable effort
DX 69 4/3/04	Dahhan	56/ 66"	2.03	2.72	69	75	Yes	Fair effort Pre-bronchodilator
			2.10	2.78	75	75	Yes	Post-bronchodilator

C. Blood Gas Studies[5]

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 10	9/17/02	Baker	41	76	R
DX 70	3/24/04	Fino	43.5	95.4	R
DX 69	4/3/04	Dahhan	49	84.8	R
			38.9	90.5	E

[4] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at Section 718.204(c)(1). *Defore v. Alabama By-Products Corp*., 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[5] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

D. Narrative Medical Evidence

Glen Baker, Jr., M.D., examined Claimant on April 28, 2001, at which time he took a patient history of symptoms and recorded an employment history of seventeen years in coal mine employment. (DX 10). Dr. Baker stated that Claimant worked underground as a drill operator and roof bolter. He found that Claimant smoked a half-a-pack to one pack of cigarettes per day between 1964 and 2000. Dr. Baker recorded a medical history of pneumonia, pleurisy, wheezing, chronic bronchitis, arthritis, heart disease, diabetes and high blood pressure. Claimant's symptoms included sputum production, wheezing, dyspnea, cough, hemoptysis, chest pain and orthopnea. Dr. Baker performed a chest x-ray, pulmonary function tests, arterial blood gas studies and physical examination on Claimant. Upon auscultation Claimant's lungs revealed decreased breath sounds. (DX 10).

Then upon reviewing the results of the examination and tests, Dr. Baker diagnosed Claimant with pneumoconiosis based on a positive chest x-ray and history of coal dust exposure; chronic obstructive pulmonary disease with an obstructive defect related to coal dust exposure and smoking, based upon the pulmonary function testing; hypoxemia based upon the arterial blood gas study; chronic bronchitis related to smoking and coal dust exposure based upon Claimant's history symptoms; and, ischemic heart disease. (DX 10). Dr. Baker also opined that Claimant suffers from a mild impairment related to smoking and coal dust exposure. He based his opinion upon the pulmonary function testing, arterial blood gas study and Claimant's pneumoconiosis and chronic bronchitis. However, Dr. Baker stated that Claimant is capable of performing his regular coal mine employment. (DX 10).

Mahmood Alam, M.D., Board-certified in Pulmonary Medicine and Critical Care Medicine is Claimant's treating physician. Dr. Alam submitted a letter dated May 11, 2004 regarding Claimant's condition. He noted that Claimant has a history of chronic obstructive pulmonary disease, pneumoconiosis and coronary artery disease. Claimant's symptoms include cough, dyspnea on exertion, shortness of breath, and sputum production. Dr. Alam noted that Claimant worked seventeen years in coal mine employment and smoked a pack of cigarettes per day for thirty years. He stated that based upon the arterial blood gas studies and pulmonary function testing that Claimant suffers from a moderate restrictive defect. Dr. Alam also stated that Claimant's chest x-ray revealed "bilateral fine interstitial patterns compatible with Coal Worker's Pneumoconiosis." He also found evidence of emphysema and bronchitis and was unable to assess whether they were related to coal dust exposure or smoking.

Dr. Alam also submitted another letter dated February 1, 2006 regarding Claimant's condition. (CX 1). He stated that he has treated Claimant since March 2003 for his lung condition. Dr. Alam has diagnosed Claimant with chronic obstructive pulmonary disease, chronic bronchitis, coal works pneumoconiosis, coronary artery disease, diabetes, peripheral vascular disease and severe anxiety. He also recorded an employment history of seventeen years in underground coal mine employment and a thirty-five year smoking history. Dr. Alam stated that Claimant's symptoms include cough, shortness of breath, congestion and dyspnea. He related the symptoms to Claimant's history of coal dust exposure and smoking. Dr. Alam opined that Claimant is unable to perform exertional work based on the pulmonary function testing, arterial blood gas study, his inability to perform exercise testing and the fact that he must be on home oxygen. He further opined that Claimant suffers from chronic bronchitis which he attributed to both coal dust exposure and smoking. Dr. Alam based his opinion upon Claimant's

pulmonary function testing, chest x-ray showing evidence of emphysema bilaterally, poor oxygenation, the fact that he quit smoking and his symptoms continue and his history of coal dust exposure.

Abdulkader Dahhan, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on April 3, 2004, at which time he reviewed the Claimant's symptoms and recorded an occupational history of seventeen years in coal mine employment. (DX 69). Dr. Dahhan noted that Claimant worked underground as a drill operator. He also found that Claimant smoked half-a-pack of cigarettes per day between the age of twenty-one and the year 2000. Dr. Dahhan found that Claimant had a history of cough, sputum production and wheezing. Upon physical examination, Dr. Dahhan noted Claimant's chest showed good air entry to both lungs with no crepitations, rhonchi or wheezing. Dr. Dahhan also performed a chest x-ray, pulmonary function tests, arterial blood gas studies and an electrocardiogram. He noted the chest x-ray revealed clear lungs with no abnormalities consistent with pneumoconiosis and the pulmonary function tests and arterial blood gas studies were normal. He also examined the other medical evidence in the record. Dr. Dahhan found no evidence of pneumoconiosis and stated that Claimant does not suffer from a pulmonary impairment. He opined that Claimant is capable of performing his last coal mine employment. Dr. Dahhan based his opinion upon the pulmonary function tests, arterial blood gas studies and chest x-ray evidence. (DX 69).

Gregory J. Fino, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on March 25, 2004, and issued a medical report on Claimant's condition on April 26, 2004. (DX 70). Dr. Fino reviewed Claimant's symptoms and recorded an employment history of seventeen years in coal mine employment. He found that Claimant smoked half-a-pack to one pack of cigarettes per day for thirty years. Dr. Fino recorded that Claimant had a history of heart disease and lung problems. At the time of the evaluation, Claimant complained of progressive shortness of breath and dyspnea upon exertion. Upon physical examination, Dr. Fino found clear lungs sounds to auscultation and percussion, without wheezes, rales or rhonchi. Dr. Fino performed a chest x-ray, pulmonary function tests and arterial blood gas studies on Claimant. (DX 70).

Dr. Fino opined Claimant does not suffer from pneumoconiosis based on the preponderance of the negative chest x-ray readings, non-qualifying pulmonary function testing, a normal diffusing capacity, a finding of no impairment in his oxygen transfer and no evidence of a restrictive defect. (DX 70). He further opined that Claimant is capable of performing his last coal mine employment. He based his opinion on the pulmonary function testing, arterial blood gas studies and Claimant's normal diffusing capacity. (DX 70).

E. Hospital Records and Treatment Notes

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for respiratory or pulmonary or related disease may be received into evidence." 20 C.F.R. § 725.414(a)(4). Furthermore, a party may submit other medical evidence reported by a physician and not specifically addressed under the regulations under Section 718.107, such as a CT scan.

The record also includes a number of treatment records from Dr. Alam, Claimant's treating physician.[6] Dr. Alam has treated Claimant since March 3, 2003. (DX 31). Dr. Alam has consistently documented Claimant's symptoms as cough, shortness of breath, sputum production and wheezing. (DX 31, 68; CX 1). Also, throughout the notes he takes into consideration a seventeen year coal mine employment history and a thirty-six year smoking history. Dr. Alam diagnosed Claimant with pneumoconiosis, chronic bronchitis, chronic dyspnea, chronic obstructive pulmonary disease and coronary artery disease. (CX 1). To monitor and treat Claimant's lung condition Dr. Alam performed a number of objective tests. He ordered a CT scan on March 10, 2003, which returned normal results; however, the qualifications of the interpreting physician were not included. A chest x-ray was performed on March 4, 2003, by Dr. Desai. He indicated a finding of no acute infiltrate. Dr. Desai made no notation as to whether pneumoconiosis was present and his qualifications are not contained in the record. The other testing is included, summarized below.

Pulmonary Function Tests in Treatment Records[7]

Exhibit/ Date of exam	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 31 3/3/03	Alam	54/ 68"	1.97	2.70	N/A	81	Only one	Cooperation and effort were not noted
DX 31 3/10/03	Alam	54/ 68"	1.85	2.48	77	75	Yes	Cooperation and effort were not noted Pre-bronchodilator
			1.54	2.14	N/A	72	Yes	Post-bronchodilator
10/08/03 DX 68	Alam	55/ 68"	1.84	2.53	N/A	73	Only one	Cooperation and effort were not noted
3/19/04 DX 68	Alam	55/ 68"	1.84	2.48	70	74	Yes	Cooperation and effort were not noted Pre-bronchodilator
			1.83	2.29	N/A	80	Yes	Post-bronchodilator
12/28/05	Alam	57/ 68"	1.85	2.55	N/A	73	Only one	Cooperation and effort were not noted

Blood Gas Studies From Treatment Records

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 31	3/6/03	Alam	44.9	81.7	R

[6] The record includes a medical opinion questionnaire filled out by Dr. Alam. (DX 31). Claimant has already designated two other medical opinion reports and therefore, this questionnaire cannot be taken into consideration. However, the treatment records located at DX 31 will be taken into consideration.

[7] Dr. Fino provided a rebuttal opinion stating that Dr. Alam's testing is invalid; however Dr. Alam submitted a rehabilitative opinion stating that the tests were valid. (EX1; DX 87). I find Dr. Alam's statements sufficient to overcome those of Dr. Fino. However, many of Dr. Alam's tests do not conform to regulation requirements and therefore, those tests will be given less weight.

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 68	?	Alam	47.2	78.1	R

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under Sections 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in Section 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
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> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The chest x-rays in the record support a finding of pneumoconiosis. First, Dr. Baker, a B-reader and Dr. Miller, a Board-certified Radiologist and B-reader, interpreted the September 17, 2002 film as positive for pneumoconiosis. Then Dr. Wheeler, a Board-certified radiologist and B-reader, found the film negative. Therefore, I find this film equivocal. Next, Dr. Fino, a B-reader, found the March 25, 2004 film negative for pneumoconiosis, but Dr. Miller found the film positive. As Dr. Miller is the more qualified physician, I find the film positive.[8] Last, Dr. Dahhan, a B-reader interpreted the April 3, 2004 film as negative, but again, Dr. Miller reinterpreted the film as positive. Accordingly, I find the film positive. The treatment records include one chest x-ray reading, but the qualifications of the interpreter and the quality of the film was not provided. Therefore, I give the film little weight. Accordingly, I find the preponderance of positive x-ray readings by more qualified physicians outweigh the negative readings. Therefore, pneumoconiosis has been established under Section 781.202(a)(1).

In the Sixth Circuit, the Board has declined to apply the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), which requires that a determination of the presence of pneumoconiosis be based on weighing all types of evidence under 20 C.F.R. § 718.202 together. Rather, the Board noted that "the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis." Therefore, as I have found that Claimant has proven pneumoconiosis through the newly submitted chest x-ray evidence there is no reason to weigh the other evidence on the subject.[9]

[8] Dr. Fino disagreed with Dr. Miller's interpretations and continued to find no evidence of Pneumoconiosis. However, since Dr. Miller is a more highly qualified physician, I give more weight to his findings.

[9] I have thoroughly reviewed and considered the medical opinion reports of Drs. Fino, Dahhan, Alam and Baker on the issue of pneumoconiosis. Even if I had weighed their opinions and the other evidence against the chest x-ray evidence, I still would have found pneumoconiosis. I give the utmost weight to the chest x-ray evidence, as is allowed under the law of the Sixth Circuit.

Since Claimant has proven pneumoconiosis, he has shown a material change in condition. Therefore, I must reopen the record and take all the evidence of record into consideration when determining the issues of entitlement. The Claimant has two previous reviewable claims filed in 1994 and 1998. The medical evidence in those claims dates prior to 1998. The Board has held that it is proper to afford the results of recent medical testing more weight over earlier testing. *See Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (granting greater weight to a more recent x-ray); *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-17 (1993) (granting greater weight to a more recent pulmonary function study); *Schretroma v. Director, OWCP*, 18 B.L.R. (1993) (granting greater weight to a more recent arterial blood gas analysis); *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985) (granting greater weight to a more recent medical report). As the medical evidence in the Miner's previous claim is over eight years old, I grant greater weight to the newly submitted evidence. Accordingly, I continue to rely on the newly submitted evidence to find that Claimant has established pneumoconiosis and when determining whether he is totally disabled due to pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

The miner was employed for ten years in coal mine employment. Therefore, Claimant is entitled to the rebuttable presumption that his pneumoconiosis arose out of such employment. Since there is no evidence in the record to rebut this presumption, I find Claimant has proven that his pneumoconiosis arose out of his employment in the coal mines under 20 C.F.R. § 718.203(b).

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence

under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[10] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). However, a non-conforming study may be entitled to probative weight where the results are non-qualifying. The Board has stated that a report's lack of cooperation and comprehension statements does not lessen the reliability of the study when it is non-qualifying. *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983).

In the pulmonary function tests of record, there is a small discrepancy in the height attributed to Claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, sixty-seven inches.

The record includes eleven pulmonary function tests, seven of which were located within the treatment records.[11] Six of the seven tests performed by Dr. Alam produced qualifying results; however, these tests do not conform to regulation requirements. The tests do not indicate the cooperation and effort levels of Claimant, and therefore, I must grant them no weight. Also, the March 25, 2004 test performed by Dr. Fino is invalid due to questionable effort, but the test produced non-qualifying results and can be considered under *Crapp.* The testing performed by Dr. Baker and Dahhan also produced non-qualifying results. Accordingly, I find per § 178.204(b)(2)(i), Claimant has failed to establish total disability by a preponderance of the pulmonary function testing.

[10] A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

[11] I counted the tests performed pre-bronchodilator and post-bronchodilator as separate tests.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

All of the arterial blood gas studies produced non-qualifying values. Accordingly, I find Claimant has not proven total disability under Section 718.204(b)(2)(ii).

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of § 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are set forth above. Drs. Dahhan, Fino and Baker all opined that Claimant is able to perform his last coal mine employment. Their opinions are based on and supported by the objective medical testing in the record. I find their opinions well-reasoned and well-documented. Dr. Alam is the only physician in the record finding Claimant totally

disabled.[12] He based his opinion upon his pulmonary function testing, arterial blood gas studies, Claimant's inability to perform exercise testing and the fact that Claimant is on home oxygen. Dr. Alam bases his opinion somewhat on testing that does not conform to regulation requirements. Therefore, I give his opinion a little less weight.[13]

I have considered all the evidence under Section 718.204(b)(2)(iv), and I find that the preponderance of the more complete, comprehensive and better supported medical opinion reports of Drs. Dahhan, Fino and Baker outweigh the less reasoned medical report of Dr. Alam. Thus, I find Claimant has not established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

Since I have found Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

ENTITLEMENT

Based on the findings in this case, although Claimant has proven pneumoconiosis and a change of condition, he has not established that he is totally disabled or that he is totally disabled due to pneumoconiosis. Therefore, E.J.'s claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim

[12] I am assigning more weight to the newly submitted evidence.

[13] The fact that Dr. Alam is Claimant's treating physician does not entitle him to more weight in this case on the issue of total disability. In order to afford a treating physician more weight, that opinion must first be well-reasoned and well-documented. *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003); *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003).

ORDER

It is ordered that the claim of E.J. for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the Administrative Law Judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the Administrative Law Judge's decision is filed with the District Director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, D.C., 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, D.C., 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).